No. 8123

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

WILLIAM DAVIES CO. INC.,
Respondent.

Petition for Rehearing.

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MAY IT PLEASE THE COURT:

Respondent respectfully requests a rehearing.

I.

The Court has sustained findings by the Board without any evidence to support such findings.

Anti-Union Activities.

On the subject of anti-union activities, the Court, on pages 2 and 3 of its opinion, makes certain references to alleged statements by the plant superintendent and the foremen to Michael Moriarity, John Canning and Paul

Ahern, and refers to the incident of Moriarity being honored by an invitation to meet with the high officials of the Respondent, at which meeting it was stated the officials of the Respondent wished to convey to Moriarity their views about unionization and to probe Moriarity about his.

It is undisputed in the record, and the Board found that Michael Moriarity was not interfered with or coerced in connection with his union affiliations, and the complaint against Respondent in connection with its refusal to reemploy Moriarity was dismissed.

Moriarity was known to have been an active member in the union because the record is clear that he was secretary of the local and had passed out cards and leaflets concerning the union and had held at least one meeting for organization purposes.

Notwithstanding these facts, the Board found that he was not laid off because of his union activity, and the court found that he was not refused employment because of his union activities or affiliation.

As to John Canning, the statement made to him on December 16, 1939, when he was not a member, did not deter him in connection with his union affiliations because a week later he became a member of the Union. Nothing that took place at the meeting between Moriarity and the high officials of the Respondent could have amounted to interference or coercion because Moriarity testified that the subjects discussed at the meeting had to do with the operation of the plant, and that everything that was said was in a friendly spirit.

The matters complained of by the Board and referred to in the Court's opinion, are trifling and inconsequential, and were more in the nature of mere badinage than anything else, and without any natural tendency to interfere

with, coerce or influence, and they are wholly unworthy of the dignity with which the opinion invests them.

Admitting the possibility of the fabled occurrence wherein the mountain after travail brought forth a mouse, it is difficult to concede that such a mouse, after travail, could bring forth such a mountain as has been made of the mole hill this record presents.

Indeed, there seems to be some question in the mind of the Court, as witness the following passage:

> "A fair minded person might well conclude that the Board was prejudiced in its action as counsel for the respondent seems to think. We have no power to review the Board's decision because it may seem to be prejudiced. We do think that the Board's decision in this case has reached the limit to which a court might go to sustain it" (op. 5).

Apparently the court has overlooked an important distinction.

If it be conceded (which we do not concede, because the inescapable result is that respondent would be deprived of all right of review) that finding that a notice was posted and what it recited, that certain words were uttered, and by whom, and to whom, and the like, are factual and not subject to review, provided they are supported by substantial evidence; can it be possible that the functions of this Court are circumscribed within so narrow limits that it is not permitted to determine whether inferences drawn therefrom are reasonable, such as naturally result from such causes instead of from mere guesswork? We think not.

There seems to us to be a distinction between findings of fact, not to be set aside if supported by the evidence, and inferences drawn from factual findings.

We urge that inferences drawn from factual findings are reviewable as questions of law, and that they must be fairly sensible, and if they are not, the Court is not bound thereby and may substitute its own reasonable conclusions for those to be accounted for only by a vivid imagination.

Would the court say that they would have no power to review the Board's inferences if it appeared that they were reached through corrupt motives? We are not willing to believe that the Court's powers are so limited, and that it can do no more than act as a stamp of approval and merely convert a Board's order to a judicial decree.

If it is the rule that all of the Board's findings and inferences whether they be supported by evidence or not, must be approved, then we contend that the court's power to review the Board's order has been unnecessarily and improperly restricted.

In *National Labor Relations Board* v. *Falk Corp.*, 102 F. (2d) 383, cited in the opinion, the following language is quoted with approval:

> "Procedure does not go so far as to justify orders without a basis in evidence having *rational probative force.*" (italics supplied.)

It is even more important that inferences drawn from findings of fact be sane and reasonable and such as a fair minded person (to use the language of the opinion) might reach, and that such inferences are subject to review as a matter of law, and are not sanctified by any rule proscribing review of conflicting evidence as a basis for fact finding. To hold otherwise would emasculate the court of its powers and deprive it of its dignity.

This court has always treated the question as to whether there is substantial evidence to support a finding of fact by the Board as a question of law. *NLRB* v. *Boss Mfg.*

Co., 105 Fed. (2d) 574; *Jefferson Electric Company* v. *NLRB*, 102 Fed. (2d) 949.

Under the Act, all questions of law are open to consideration by the reviewing court. Likewise, by the express terms of the Act, factual findings of the Board are conclusive upon the reviewing court only if supported by evidence.

In the *Acme Evans* case,[1] although Judge Evans said that the only prerogative of the Appellate Court was to act as a "rubber stamp" to enter "orders required by the Board that its order may be enforced as a judicial decree," he also said that it was the Court's duty to ascertain whether substantial evidence supports the (Board's) finding.

In the *Aintree* case[2] Judge Kerner said that the question which the Court was asked was to determine "whether the findings are sustained by substantial evidence."

It frequently has been held that the question of the reasonableness of a notice is one of law for the court to determine (see cases cited in brief of Respondent, page 59). The same rule seems applicable as to inferences drawn from factual findings.

The rule to which the opinion subscribes is too harsh and is not found in any of the three cases cited by the Court in its support.

The opinion states (op. 3) "the slightest interference, intimidation or coercion by the employer of the employees in the rights guaranteed to the employees by the statute, constitutes an unfair labor practice in violation of Section 8(1) of the Act," citing three cases to which we shall refer and which we submit do not support or authorize so harsh a rule.

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[1] 130 Fed. (2d) 477.
[2] 132 Fed. (2d) 469.

National Labor Relations Board v. *W. A. Jones Foundry & Machine Co.*, 123 F. (2) 552, is the first of the cases cited.

To review the findings of fact in that case would extend this petition to an improper length. It should suffice to say that there the antagonism, interference and attempted coercion was positive and extreme. Here it is not, but on the contrary, is evidenced only by mere idle chatter.

There, the AFL union was forbidden to solicit membership on the company's time, but an independent union had been permitted so to do.

Here, there is nothing of the kind.

There, while there had never been any union activity, it blossomed forth November 9, 1939, when it met a sudden response by the company, and Coleman (executive officer in charge of the company) went immediately into action.

These expressions are found in the opinion and are only some of many which establish not only a settled opposition to union activity but affirmative action which could only be calculated to interfere with and to intimidate.

Nothing of the sort here exists and the matters relied upon to show intimidation and coercion are mere trifles.

It was held that it was "clear" that the activities of the company officials were intended to and did influence the employees; that findings to that effect are sustained by substantial evidence; that the purpose of the Act was to guarantee to employees freedom of interference in their efforts to organize and to bargain collectively.

There is nothing in that opinion to support the proposition to which it is cited, namely, that the "slightest interference" constitutes an unfair labor practice here.

Here the few trifling occurrences in evidence do not in themselves import any such intention and have no such

natural consequences, and we submit there is no substantial evidence to support the unreasonable inference which the Board asks be approved.

Rapid Roller Co. v. *NLRB,* 126 F. (2) 452 is also cited in the opinion.

This also was a case in which anti-union activities were not only extreme but were clearly shown to have been intentional.

There were threats to get even with those engaged in unionizing endeavors, even if it took one year or five years to do so, and to move the plant elsewhere, where statedly freedom from labor difficulties was guaranteed.

The findings of fact as to unfair practices were sustained. It is not perceived how it could have been otherwise. There was not only substantial evidence in support but it is quite obvious that if the court had been permitted to weigh the evidence the same conclusion would have been arrived at.

However, there is nothing in the opinion to support the proposition as to slightest interference to which it is cited in the instant case.

> *National Labor Relations Board* v. *Falk Corp.,* 102 F. (2) 383.

This case, also cited in the opinion, is likewise by no means a parallel case, but is in fact one in which the company actively sponsored, promoted and organized an independent rival union.

There it was said that the employer not only has a right to his views, but that the right to entertain views is valueless if not accompanied by the right to express them.

As in the two previous cases cited in the opinion, we have here sought in vain for any expression tending to support the harsh rule of slightest interference.

However, we claim that in the instant case there was no interference. It is not a border line case. Rather is it a case wherein the opinion upholds the vivid imagination of the Board founded upon flimsy and inconsequential showing instead of a reasonable inference fairly drawn from factual findings supported by substantial evidence as distinguished from mere guesswork.

Eliminating the mere conjecture, there is no evidence in the record to support the findings.

We also submit that whether inferences drawn are sane and such as naturally flow from the occurrences, is a question of law and open to consideration by the court which we have hereinbefore discussed.

In addition to the inconsequential language, and then uttered only in surprisingly few instances, there is only the question of the posted notice.

We disagree with the stated view that the notice is an interference and an anti-union activity merely because it refers to solicitation in behalf of unionization only.

The notice is addressed to employees only as appears from the statement therein that violators will be discharged. The company could not very well threaten discharge to an apple vendor for soliciting employees to purchase apples. There was no need to post any notice as to them. The company could otherwise effectively prevent their activities if they became such as to amount to a nuisance, and there was no other rival union engaging at any time in such solicitation and no solicitation was being or had been indulged against the union then active. Hence there was no discrimination. There was no occasion to refer to non-existent activities.

It is not perceived that there can be a discrimination against one party unless there is another party who is favored. Here there is none.

The cases which have come to our notice on this point are ones in which solicitation by one union was forbidden, and at the same time solicitation by another was permitted.

Under the circumstances, mention of solicitation for unionization only, signifies nothing.

It is respectfully urged that the Court consider its views so expressed in order that it may properly consider and determine the question which Respondent has raised as to the sufficiency of the evidence to support the Board's conclusions and findings.

It is also to be observed that the notice, although condemned in this connection, is later in the opinion, held to be a proper notice as a basis for discharge of a violator. This inconsistency seems to have been overlooked.

Discharge of McNally.

The Board concluded that McNally was discharged for union activities and not for violation of the non-solicitation rule as Respondent contended.

The state of the record upon this question is briefly and fairly set out in the brief for the Respondent, commencing at page 34.

In upholding the action of the Board the opinion holds (op. 4) that McNally was not discharged for violation of the non-solicitation rule because his proven activities to bring it about that employees should join the union included no words of solicitation, and accordingly were not within the inhibition. This places entirely too narrow a limit upon the meaning of the word "solicitation" when used in this connection. It is not necessary to beg in order to solicit.

Statements calculated to persuade or to encourage constitute solicitation as unmistakably as does an entreaty.

In *Midland Steel Products Co.* v. *NLRB*, 113 F. (2) 800 (CCA 6, 1940) there was under consideration a notice forbidding solicitation on company property without approval of the management under penalty of discharge for violation, and in holding the rule to be a reasonable one, the court said, at page 805:

> "Since the rule was violated the discharge was lawful, unless the rule was unreasonable and hence null and void. The employer in his right of control over the property and the employee is authorized to make reasonable rules for the conduct of the business and the employee is bound to obey such reasonable rules as a part of his contract to hire.
>
> "Whether this rule was reasonable is a question of law for the court to determine. *Little Rock & M. Rd. Co.* v. *Barry*, 84 F. 944 (CCA 8); *Mo. K. & T. Ry. Co.* v. *Collier*, 157 F. 347 (CCA 8); *Chicago, R. I. & P. Ry. Co.* v. *Ship*, 174 F. 353 (CCA 8); *Central Rd. of N. J.* v. *Young*, 200 F. 359 (CCA 3).
>
> "We think the rule is clearly reasonable. The employer has the right on the premises to demand the single minded attention of the employee to his work. In modern industry the performance of work with efficiency and without physical danger, depends not only upon the devotion of the employees to their work but also upon the amity with which they cooperate.
>
> "The right of the employer to make reasonable rules for the safety and efficiency of the work includes his right to make such rules for the entire time that the working force is on the employer's premises. Solicitation, argument, the hurling of epithets, intense discussion before work has been commenced, or in the noon hour, may reasonably be expected to carry over into work hours."

It will be noted that the court held that the reasonableness of the rule is a question of law for the court to determine.

We submit that this view applies with equal force to the reasonableness of conclusions and inferences for which we have heretofore contended herein.

Discharge of Canning.

The opinion upholds the action of the Board with reference to the discharge of Canning, which the Board inferred was on account of union activities and not because he did his work improperly, and joked around while on the job (op. 5-6).

The remarks made to Canning are summarized in the opinion at page 2 and we think it unfair to state, as the opinion does, that the superintendent warned Canning; that is not a fair interpretation of such casual and inconsequential remarks.

The opinion states,

> "There seems to be no question but what Canning had not properly performed his work."

There is no substantial evidence in the record from which it can reasonably be inferred that the discharge of Canning was for any other reason than his proven inefficiency. An employee is not clothed with immunity from discharge for bad workmanship, merely because he is able to exhibit a card of membership in a union. Canning's work was proven and found to have been improperly performed, the opinion so states, and we submit there is no foundation for the mere conjecture that his discharge was for union activities instead of for inefficiency, as respondent established and contends.

Canning was guilty of the same inefficiencies and deficiencies in his work as was Balda, another employee who was discharged for the same cause, and whose discharge was held to have been justified by the Board. In

addition to those inefficiencies and deficiencies Canning was found by the Board to have joked around during his work. Can it be that Canning's membership in a union, together with the foreman's alleged statement a week prior to the time that Canning joined the union, immunizes him from discharge for a cause found by the Board to be otherwise sufficient? This is the effect of the court's decision.

We quote further from page 5 of the opinion:

> "The evidence supporting these two cases is so fine as to approach the last limit between evidence and no evidence. A fair minded person might well conclude that the Board was prejudiced in its action as counsel for the respondents seems to think. We have no power to review the Board's decision because it may seem to be prejudiced. We do think that the Board's decision in this case has reached the limit to which a court might go to sustain it."

In our opinion it not only has approached but has far out-distanced that limit; but however that may be, we do not understand the test to be whether the finding is supported by evidence or by no evidence, but whether there is substantial evidence in the record to sustain the finding. Eliminating the mere conjecture, we submit there is not.

We also submit that whether inferences drawn are sane, and such as naturally flow from the occurrences, is a question of law and open to consideration by the court, which we have hereinbefore discussed.

Scope of Order.

The Court failed to consider Respondent's point No. 5 of the contested issues and the opinion is silent thereon.

The Court has, without exception, refused to enforce a blanket cease and desist order such as is found in the Board's order. The general provisions of the order directing the Respondent to cease and desist from *in any*

other manner interfering with, restraining or coercing its employees in the exercise of the right to self organization, to form, join or assist labor organizations to bargain collectively through representatives of their own choosing and to engage in concerted activity for the purposes of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act, is not found in the complaint and is entirely unsupported by the evidence.

CONCLUSION.

It is respectfully submitted that the opinion appears to have been reached through inadvertence and mistake; that it is unjust and unfair to respondent and is contrary to law, and that a rehearing should be allowed, the case reconsidered, and a more tenable conclusion reached.

Respectfully submitted,

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